In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1220

JOE A. CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of assaulting, impeding and interfering with an officer of the Immigration and Naturalization Service, in violation of 18 U.S.C. 111. He was sentenced to imprisonment for eighteen months, forty-five days of which was to be spent in jail, the balance to be suspended during probation for a period of five years. He was also fined $500 (R. 328, 331). The court of appeals affirmed per curiam (Pet. App. 1-2).

The evidence on behalf of the government was that, while an inspector for the Immigration Patrol was endeavoring to check the papers of Mexican laborers on petitioner's cotton farm, petitioner knowingly assaulted him, necessitating his hospitalization for three days (R. 1-86). Testimony on behalf of petitioner was given by three of his employees, who stated that the inspector started the fight (R. 135-195). Petitioner did not testify. Following the verdict, petitioner produced the affidavit of one of the jurors that the jury had disregarded the court's admonition not to consider petitioner's failure to testify in arriving at their verdict, and sought a hearing in which the jurors would be questioned as to this matter (R. 339, 341).[1] This court denied the motion (R. 342).

The court properly refused to conduct an inquiry as to the deliberations of the jury and the considerations which entered into their verdict. The rule against impeaching a verdict by the testimony of jurors is based upon the public policy against harassing jurors after their services have been ended and because of

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[1] The affidavit alleged (R. 339):

> During the course of the deliberations by the jury it was freely discussed among the jurors that the defendant had not taken the witness stand to testify in his behalf. One of the women jurors said, "He would have taken the stand and testified if all of the testimony against him were false."
>
> Numerous comments were made regarding the defendant's failure to take the stand. It appeared to me that the defendant's failure to take the stand hurt him in the eyes of the jury generally and that some of the jurors considered his failure to testify in determining his guilt.

the manifest possibilities of fraud and abuse if such a means of overturning verdicts were recognized. *McDonald* v. *Pless*, 238 U.S. 264; *Hyde* v. *United States*, 225 U.S. 347, 383-384; *Butler* v. *United States*, 317 F. 2d 249, 262 (C.A. 8), certiorari denied, *sub nom. Benedec* v. *United States*, 375 U.S. 836.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

May 1966.

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